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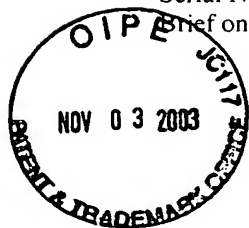
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Serial No. 10/022,755

Brief on Appeal



Attorney Docket No. LPN-10203/03

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF APPEALS AND INTERFERENCES**

Applicant: Erik Lipson

Serial No.: 10/022,755

Group Art Unit: 3727

Filed: December 13, 2001

Examiner: Stephen J. Castellano

For: DRINK CONTAINER WITH MOLDED STRAW AND
METHOD OF MANUFACTURE

BRIEF ON APPEAL

Mail Stop Appeal Brief - Patents
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Dear Sir:

I. Real Party in Interest.

The real party in interest in this appeal is Fun-Time International, Inc., the assignee of the above-referenced application.

II. Related Appeals and Interferences.

Appellant is aware of no related appeals and interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status of Claims.

Claims 1-12 are presently pending, and all stand finally rejected. All are the subject of the present appeal.

IV. Status of Amendments.

Appellant has filed no amendments subsequent to final rejection.

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V. Summary of the Invention.

In its broadest aspects, Appellant's invention is a combination drinking container and straw. The container has a wall which encloses a chamber, a bottom, an open top and a groove formed in the container wall. The straw is disposed in the groove. The straw has a first end which is in fluid communication with the chamber of the container, as well as a second drinking end which extends upwardly from the container so that liquid may be sipped through the straw from the container while the straw is disposed in the groove. At least part of the configuration of the straw is defined by the configuration of the groove.

In another aspect of the present invention, the container includes a lid which is configured to close the open top. The lid includes an aperture formed therethrough. A first portion of the straw extends from the container and through the lid aperture, and a second portion of the straw is attached to the container and terminates in a sipping end. The straw functions as a hinge for the lid, and retains the lid to the container when the lid is moved from the container.

VI. Issues.

A. Can the straw disclosed in U.S. Patent No. 4,607,755 (to Andreozzi) have a second drinking end which extends upwardly from the container so that liquid may be sipped from the container while the straw is disposed in a clip which the examiner considers equivalent to a groove?

Appellant answers "No."

B. Would one of skill in the art find any motivation in any of the prior art of record to modify the container and straw taught by U.S. Patent No. 5,048,705 (to Lynd et al.) to achieve the claimed invention?

Appellant answers "No."

C. Do any of the references of record teach or suggest using a portion of the straw as a lid to retain the lid onto a combination drinking container and straw when the lid is removed from the container?

Appellant answers "No."

VII. Grouping of Claims.

For purposes of appeal, Appellant groups claims 1-11 together, and will argue separately for the patentability of claim 12. Accordingly, it would be possible for the Board to reverse the rejection of one or more of claims 1-11 without reversing the rejection of claim 12, and it would also be possible for the Board to sustain the rejection of one or more of claims 1-11 without sustaining the rejection of claim 12.

VIII. Argument.

A. The Examiner's Rejections.

The examiner has finally rejected claims 1-11 under 35 U.S.C. §103(a) as unpatentable over Andreozzi. According to the examiner:

Andreozzi discloses a combination drinking container and straw comprising a container, a straw retaining member (clip 40) formed in a wall of the container and a straw (flexible straw 34 and tube 20), a first downwardly extending end of the straw is in fluid communication with a chamber of the container and a second upwardly extending end (from 38 to 36).

The examiner acknowledges that "Andreozzi discloses the invention except for the groove since it is not known whether the clip 40 is elongated enough to form a groove." However, the examiner points out that "It is well known to make clips with elongated grooves such as a standard binder clip." Accordingly, "increased surface area contact to prevent the straw from inadvertently becoming detached and increased structural support according to a longer clip with respect to a C-ring clip" would have been an obvious motivation to one of skill in the art, according to the examiner.

The examiner has also rejected claims 1-11 as unpatentable over the combination of Andreozzi and further in view of U.S. Patent No. 5,460,264 to Rupert and U.S. Patent No. 3,332,567 to Pugh. The examiner cites both of these patents for teaching a groove formed in the side wall of a beverage container. Again, the motivation to change the clip actually taught by Andreozzi into a groove in view of these two additional references is identical to that stated above.

The examiner has also rejected claims 1-12 as unpatentable over Andreozzi or, alternatively, Andreozzi in view of Rupert and Pugh in view of Lynd et al. The final office action further states **“Note that claim 12 is only rejected as being unpatentable over Andreozzi in view of Lynd.”** The examiner further states:

This rejection is made in the event that the straw [of Andreozzi] can't include portions 34 and 20 and in the event that the lid can't be slid upwardly pass [sic] inner end 36 of straw 34.

Andreozzi discloses the invention except for the first end of the straw extending into the container to terminate proximate a closed bottom of the container and a straw which has a loop which extends through an aperture in the lid to form a hinge for the lid. Lynd teaches a straw which is inserted through an aperture in a central portion of the lid so that a first end of the straw terminates proximate a closed bottom of the container. It would have been obvious to replace tube 20 of the container of Andreozzi with a lengthened portion of flexible straw 34 which is inserted through the aperture in the lid that is moved towards the central portion of the lid by modifying the size of the straw or the size of the aperture such that the aperture will frictionally engage the straw as taught by Lynd in order to improve the assembly of the lid and straw by making the assembly of two pieces instead of three pieces requiring less parts that are required to mate, in order to move the straw connection away from the rim of the container so that the rim doesn't interfere with the straw connection and in order to provide a friction fit between the straw and aperture in the lid to maintain removability and establish a fit which is substantially splash and spill proof.

The examiner also rejects claims 1, 2, 6 and 7 as obvious over Lynd. For this rejection, the examiner states:

Lynd discloses a combination drink container and straw comprising a container having a cap (14) forming a top wall enclosing a chamber and a straw retaining member (sleeve 32) formed in the top wall and a straw disposed in the straw retaining member. Lynd discloses the invention except for the groove since sleeve 32 can't be considered a groove. It is known to form a groove out of a sleeve by removing a portion of the wall of the sleeve. It would have been obvious to remove a portion of the sleeve and form a groove motivated by a savings in material and cost and motivated by more flexibility and greater movement of the straw while the straw is still retained within the remaining structure of the sleeve 32.

Finally, the examiner rejects claims 3, 4, 8 and 9 as unpatentable over Lynd in view of U.S. Patent No. 4,576,336 to Cohen, deceased et al. The examiner acknowledges that Lynd does not disclose a loop which forms a handle. He cites Cohen for teaching the combination of a drinking container and straw which forms a loop and the loop forms a handle. According to the examiner:

It would have been obvious to modify the straw [of Lynd] to have a loop and the loop which functions as a handle in order to provide a straw which can be retained in a rigidly fixed position with respect to the container so that the container can be moved by handling of the straw alone and so that the straw doesn't become dislodged from its fixed position.

B. The Andreozzi Reference, Either by Itself or Combined with the Other References of Record, Does not Meet Important Limitations of Appellant's Claims.

Independent claims 1, 6 and 11 all require that liquid may be sipped through the straw from the container "while the straw is disposed in the groove." This is manifestly untrue of the Andreozzi structure. Andreozzi discloses a combination drinking container and two-piece straw. One portion of the straw is a drinking tube 20 molded into the inside wall of the container 16. The other portion is a flexible straw 34 which is slip fit over the upper end 23 of the tube 20. A clip 40 attached to the outside wall of container 16 retains the free end of flexible straw 34 when the device is not in use.

When the first end of the straw of Andreozzi is retained in Andreozzi's clip 40, it could arguably be said that it meets the limitation of these claims that the configuration of the straw be defined by the configuration of the groove. However, when the straw of Andreozzi is retained in the clip, it clearly does not extend upwardly from the container so that liquid may be sipped through from the container. This is manifestly obvious from an examination of Figure 2 where we see the free end 38 of Andreozzi's straw clearly retained in the clip 40. The Andreozzi disclosure, itself, states in column 3, lines 40-45:

With the liquid having already been introduced into the interior of the container 12, the flexible straw 34 is removed from the non-use position illustrated in FIG. 2 by withdrawing the free end 38 from the clip 40 and extending the straw to the desired location.

In other words, the configuration shown in Figure 2 of Andreozzi is a storage configuration and liquid may not be sipped from the straw (at least not without great difficulty) while the straw is in the nonuse position, with its free end retained in the clip 40.

In fact, in order to sip liquid through Andreozzi's straw it must be removed from the retaining clip. There is no specific disclosure in Andreozzi that, even when the straw is removed from the clip, its first end extends upwardly, as required by the claims. In fact, Figure 1 seems to indicate that it extends downwardly. However, even if the straw could be reconfigured when it is out of the clip so that its upper end extends upwardly, then its configuration is no longer defined by the configuration of the clip (which the examiner appears to find equivalent to the recited groove) since it is no longer retained in the clip.

In other words, there is no fair reading of the Andreozzi reference that teaches a straw which has an upwardly extending drinking end so that liquid may be sipped from the container through the straw while the straw is disposed in anything that could be considered a retaining member, be it a clip or a groove. Accordingly, merely modifying the clip actually taught by Andreozzi to make it some kind of a groove simply wouldn't meet the claim language of claims

1-11, and any attempt to reject these claims over this reference alone is doomed to failure. Moreover, attempting to combine it with other references which actually teach grooves cannot help the situation because, once again, the business end of Andreozzi's straw can only be drunk from when it is released from the clip, and the straw is no longer retained by the clip.

For these reasons, Appellant submits that claims 1-11 are patentable over Andreozzi; Andreozzi and Pugh or Rupert; or Andreozzi, Rupert, Pugh and Lynd et al. The Board should reverse this ground of rejection.

**C. The Lynd et al. Reference Fails to Disclose
the Basic Structure Required by the Claims.**

The Lynd reference is quite different from Andreozzi. It teaches a bottle with a cap which closes the top. An aperture is formed in the cap for receiving an elongated drinking tube that extends to the bottom of the bottle and has an end exterior of the bottle from which liquid may be drunk. A sleeve 32 extends upwardly from the lid and has several functions. According to Lynd's specification:

This sleeve 32, while being of relatively short vertical extent, does provide lateral support for the drinking tube and prevents it being twisted to any significant extent at this point of passing through the cap and to better assure that the fluid seal will not be destroyed.

One of the primary objects of Lynd's container and straw is to provide an arrangement whereby fluid may be sipped from the container without undue spillage.

The examiner reads the sleeve 32 as a straw retaining member, and acknowledges that it can't be considered a groove.

The examiner ignores the fact that the claims require that the groove be formed in the wall of the container. This is abundantly not the case in Lynd wherein the sleeve is formed on the lid. Accordingly, it would take a lot more modification than simply turning the sleeve into a groove (it is not at all clear how one could actually do that). One would have to first of all move

the sleeve to the container wall (which, of course, doesn't make any sense) and would then further have to somehow change the sleeve configuration, which would have no use at all if it were disposed in the container wall, in the tube groove required by the claims.

Appellant will not further belabor this issue. It is abundantly apparent that the examiner simply has ignored one of the important structural limitations required in claims 1-11. Accordingly, the obviousness rejection over Lynd, or the combination of Lynd and Cohen, is fatally flawed and the Board should act to reverse it.

D. Claim 12 is not Obvious over the Combination of Andreozzi and Lynd.

Unlike claims 1-11, claim 12 does not require either a groove, the configuration of the straw being defined by the groove, or the sipping end of the straw which extends upwardly from the container while the straw is retained in the groove. Rather, the claim contains the recitation "wherein the straw functions as a hinge for said lid, retaining said lid when said lid is removed from said cup." If we look at the Andreozzi reference, we find that the upper end of the integral drinking tube 20 extends through an aperture in the lid 24 and terminates a very short distance above the lid. If the flexible straw 34 is not attached to the tube 20, clearly the tube alone could not possibly retain the lid to the combination cup and straw, thus not meeting the limitation of claim 12. Rather, the lid would simply slip off of the short end of drinking tube 20. However, if the flexible straw 34 is attached to the tube, then the lid cannot be removed from the cup because, as is clearly shown in the sectional view of Figure 2 of Andreozzi, the end of the straw 34 is mounted onto the upper end 23 of the tube 20 such that it encompasses the entire end 23. In other words, the end of straw 34 has a diameter which is larger than the diameter of the tube 20 so that it may be fit over the end of the tube. As depicted in Figure 2, the diameter of the aperture is the same as the diameter of the tube 20, as we would expect when we read the portion of Andreozzi's disclosure (column 2, lines 52-56) which explains that the lid prevents

spilling of the contents of the container “when the vessel is in a position of use and particularly during movement of the vehicle in which the vessel is mounted.” Obviously if, contrary to what is depicted in Figure 2, the aperture were larger than the tube, liquid could leak from it.

Accordingly, we have a lid in Andreozzi with an aperture having a diameter which is smaller than the diameter of the flexible drinking straw 34. Accordingly, when the flexible straw is mounted on the drinking tube, the lid cannot be removed from the container and the straw cannot serve as a hinge for the lid, as required by claim 12. Of course, when the flexible straw 34 is removed from the drinking tube 32, then the lid can be removed from the container, leaving no structure left to function as the hinge. Accordingly, Andreozzi does not disclose any structure which meets the limitation of claim 12.

Of course, Lynd, which depicts a simple, relatively straight straw extending upwards from the container, also teaches nothing even remotely resembling a structure or portion in the straw which would function as a hinge to retain the lid when the lid is removed from the container. Accordingly, since there is nothing in either Andreozzi (which, if anything, teaches away from the idea of using the straw as a hinge for the reasons previously stated) or Lynd to suggest a hinge, combining these two references in the manner suggested by the examiner to achieve Appellant’s invention as defined in claim 12 represents nothing more than impermissible hindsight on the part of the examiner. It should be noted that none of the “motivations” mentioned by the examiner in the final office action have anything to do with the problems which Appellant’s present invention attempts to solve, namely providing a combination drinking container and drinking straw in which the straw is attached to the container in a secure, semi-permanent manner, which combination presents an aesthetically pleasing, integrated and easy to use design wherein the lid may be removed from the container

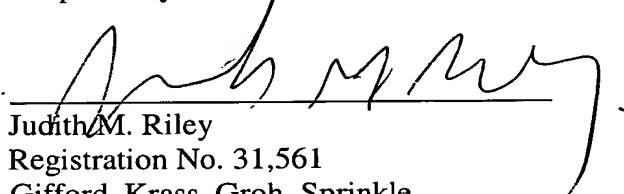
in order to refill the container, yet is still retained to the combination of the straw and the container by the hinge portion of the straw.

Therefore, this obviousness rejection of claim 12 over the combination of Andreozzi and Lynd is based on a clear misreading of what the Andreozzi reference actually teaches and Appellant respectfully requests the Board to reverse it.

IX. Conclusion.

Appellant has shown that the Andreozzi reference fails to disclose, teach or suggest critical limitations of claims 1-11. Accordingly, all obviousness rejections based on Andreozzi are insufficient and should be reversed. Appellant has demonstrated that the obviousness rejection of claims 1-11 over Lynd is also flawed and should be reversed. Finally, combining Andreozzi and Lynd to reject claim 12 is improper because neither reference contains any disclosure of any structures which could function as a hinge as required by claim 12. Accordingly, this rejection should also be reversed.

Respectfully submitted,



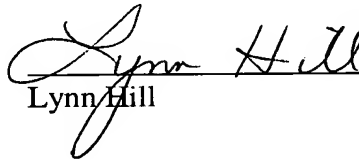
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Lynn Hill

APPENDIX A

CLAIMS ON APPEAL

1. A combination drinking container and straw comprising:
a container having a wall enclosing a chamber, a bottom, an open top, and a groove formed in said wall; and
a straw disposed in the groove, the straw having a first end which is in fluid communication with the chamber of the container and a second drinking end which extends upwardly from the container so that liquid may be sipped through from the container while the straw is disposed in the groove, wherein at least part of the configuration of the straw is defined by the configuration of the groove.
2. The combination of claim 1 in which at least a portion of a pathway traversed by the straw is spaced from the container wall.
3. The combination of claim 2 wherein said portion is a loop.
4. The combination of claim 3 wherein said loop forms a handle.
5. The combination of claim 3 further comprising:
a lid for closing the top of the container, the lid having an aperture formed therethrough, said loop extending through said aperture to form a hinge.
6. A combination drinking container and straw comprising:
a container having a wall, a bottom, an open top, and a groove formed in the wall; and

a straw disposed in the groove, the straw having a first end which extends into the container and a second drinking end which extends upwardly from the container so that liquid may be sipped through from the container while the straw is disposed in the groove, wherein at least a part of the straw is held in position with respect to the container by the groove.

7. The combination of claim 6 in which at least a portion of a pathway traversed by the straw is spaced from the container wall.

8. The combination of claim 7 wherein said portion is a loop.

9. The combination of claim 8 wherein said loop forms a handle.

10. The combination of claim 8 further comprising:

a lid for closing the top of the container, the lid having an aperture formed therethrough, said loop extending through said aperture to form a hinge.

11. A combination drinking container and straw comprising:

a container having an outer wall, a bottom, an open top, and a groove disposed in an outer surface of the outer wall;

a lid for closing the top of the container, the lid having an aperture formed therethrough;

a straw disposed in the groove, the straw having a first end which extends into the container to terminate proximate the closed bottom thereof and a second end which extends upwardly from the container so that liquid may be sipped through from the container while

the straw is disposed in the groove, wherein the configuration of the straw is defined by the configuration of the retaining member; and

a loop formed by the straw proximate the container top such that, when said straw extends through said aperture, said loop hinges said lid onto said combination even when said lid is removed from said container.

12. A combination drinking container and straw comprising:

a container having an open top, a lid configured to fit on said container to close said open top, said lid including an aperture formed therethrough, and a straw, a first portion of which extends from said container and through said lid aperture and a second portion of which is attached to said container and terminates in a sipping end, wherein said straw functions as a hinge for said lid, retaining said lid when said lid is removed from said cup.